IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 460

WILLIAM J. CLEARY,
Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY,
A CORPORATION,
Respondent.

OPPOSING BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

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CORRECTION OF PETITIONER'S SUMMARY OF THE CASE.

Petitioner is correct in stating that under the Illinois statute the First Division of the Appellate Court has authority to assign cases (Pet. 4). It appears, however, from the petition by implication that the Third Division denied petitioner's motion for a reassignment of the cause to another division. Petitioner's motion in that court for a reassignment of the cause was not passed on by the Third Division to which the case had been assigned. That motion was denied by the First Division which presided in none of the three appeals (Trans. 3, p. 43 fol. 47).

Under the title, "The question presented," the petitioner relies solely, as a basis for review by this court, on the refusal of the Appellate Court to reassign the cause to another division of that court. This statement is substantially repeated under the heading, "Reasons relied on for allowance of writ." As required by Rule 38(2) of this court, it is properly and will be treated as the only ground in issue (Pet. 10).

SUMMARY OF ARGUMENT.

I.

The Question of Due Process, Which Is the Only Point Petitioner Seeks to Raise, Is Not Real and Substantial.

II.

The Review Which Petitioner Seeks of the Action of the Illinois Supreme Court, Dismissing His Writ of Error, Presents No Federal Question.

(1) The Supreme Court of the United States has uniformly held that it is bound by the construction the State Court gives to the State Constitution and State statutes.

(2) The Supreme Court of the United States has uniformly held that it rests with each state to prescribe the jurisdiction of its appellate courts and the mode and time for invoking their jurisdiction.

(3) The mode of review of the Appellate Court judgment prescribed by state law was by petition for leave to appeal in the Supreme Court of Illinois. Petitioner did not avail of this. He was not justified in failing thus to seek to engage the State Supreme Court's jurisdiction by the fact that that court had discretion to allow or deny such a petition.

(4) Petitioner failed to exhaust available remedies in the State Supreme Court as he must before resorting to the Supreme Court of the United States.

ARGUMENT.

I.

The Question of Due Process, Which Is the Only Point Petitioner Seeks to Raise, Is Not Real and Substantial.

In order to invoke the jurisdiction of this court it is essential, at the outset, that the federal question which petitioner seeks to raise be one which is real and substantial. *Consolidated Turnpike* v. *Norfolk, etc. Ry. Co.* (1913), 228 U. S. 596, 599-600. Here the petition for certiorari fails to meet that essential requirement.

The sole question which petitioner presents (Pet., p. 10) is whether he was deprived of due process by refusal of the First Division of the Illinois Appellate Court to reassign his case to a division of that court other than the Third Division, to which it had been originally assigned by the First Division.

The only ground urged by petitioner for the reassignment was that when the cause had been before the Third Division of the Illinois Appellate Court for hearing on the former appeal, Mr. Justice Burke, one of the three justices of that division, had rendered a dissenting opinion expressing a view of the law unfavorable to petitioner's case. Justice Burke, of course, did not preside at any of the three trials had in the Municipal Court of Chicago (Trans. Vol. 1, pp. 52, 136, 189). No charge of personal prejudice was made against Justice Burke. On the contrary, the affidavit in support of petitioner's motion for reassignment affirmatively stated that *no doubt was entertained as to the honesty and fairness of Justice Burke* (Trans., Vol. 2, pp. 1167-68).

What more can be required of a judge than that he be honest and fair? The statement contained in the aforementioned affidavit concedes that, in law, Justice Burke was qualified.

The overwhelming weight of authority is that the mere fact that a judge in the discharge of his official duties expresses an opinion of the law upon the evidence before him does not constitute any bias or prejudice which will disqualify him from proceeding further in the cause. The precise point was recently passed upon in *Trade Comm'n* v. *Cement Institute* (1948), 333 U. S. 683, where this court (referring to *Tumey* v. *Ohio* (1927), 273 U. S. 510, relied on in petitioner's brief) said, commencing at page 702:

> "Neither the *Tumey* decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.
>
> "The Commission properly refused to disqualify itself."

Same effect:

Ex parte Am. Steel Barrel Co. (1913), 230 U. S. 35, 43, 44.

King v. *Grace* (1936), 293 Mass. 244, 200 N. E. 346, 348.

Kolowich v. *Wayne Circuit Judge* (1933), 264 Mich. 668, 250 N. W. 875.

Slayton v. *Commonwealth* (1946), 185 Va. 371, 38 S. E. (2d) 485, 487.

56 Am. Jur. pp. 59, 60—Title, Venue, Sec. 57.

At the outset, therefore, it is apparent that the petition for certiorari raises no real and substantial federal question of the type necessary to give this Court jurisdiction.

II.

The Review Which Petitioner Seeks of the Action of the Illinois Supreme Court, Dismissing His Writ of Error, Presents No Federal Question.

Petitioner asks to have reviewed by certiorari the judgment of the Illinois Supreme Court (Pet., p. 1). The only judgment entered by the Illinois Supreme Court in this cause[1] was its order of September 15, 1948, dismissing a writ of error by which petitioner sought review of a judgment which had been entered by the Illinois Appellate Court reversing a judgment of the Municipal Court of Chicago (Trans. 3, pp. 46-7).

That dismissal was based on the motion of the defendant in error in the Illinois Supreme Court, which motion assigned only the following grounds:

> (1) "There is no warrant or authority in law for the prosecution of a writ of error in the cause."
> (2) "This court has no jurisdiction to entertain a writ of error in this case as the proceeding was not begun within the forty days required by law."
> (3) "The writ of error may not be treated as a petition for leave to appeal under Rule 28 of the rules of this court" (Trans. 3, pp. 26-27).

The issues thus presented by the motion involved Illinois appellate *procedure*, only, and they exclude any possible Federal question. It was in pursuance of this motion that the writ of error was dismissed (Motion and grounds in support thereof, Trans. 3, pp. 26-40).

[1] Except an order entered September 22, 1948, denying a motion to reconsider its order of dismissal. Trans. 3, p. 54.

The state constitution renders a review of Appellate Court judgments by the Illinois Supreme Court by writ of error imperative in only four clearly defined cases. Article 6 of Section 11 of that constitution (Ill. Rev. Stat., 1947, p. 26) provides:

> "After the year of our Lord 1874, inferior appellate courts, of uniform organization and jurisdiction, may be created in districts formed for that purpose, to which such appeals and writs of error as the general assembly may provide may be prosecuted from circuit and other courts, and *from which appeals and writs of error shall lie to the supreme court, in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved, and in such other cases as may be provided by law.* Such appellate courts shall be held by such number of judges of the circuit courts, and at such times and places, and in such manner, as may be provided by law; but no judge shall sit in review upon cases decided by him, nor shall said judges receive any additional compensation for such services." (Italics added.)

The quoted section has been construed by the State Supreme Court. In the case of *Lake Shore and Michigan Southern Railway Co.* v. *Richards* (1894), 152 Ill. 59, 71, 38 N. E. 773, 774, that court held:

> "In four classes of cases,—that is, criminal cases, and those involving a franchise or freehold or the validity of a statute,—the legislature is prohibited from making the determination of such Appellate Courts final. In such cases appeals and writs of error must be allowed to the Supreme Court. In all other cases in which such courts are given jurisdiction by statute it is left by the constitution *discretionary with the legislature to make the judgments of those courts final, or to provide for further appeal or writ of error, as in the legislative discretion shall be deemed proper.* It necessarily follows, that since the creation and organization of the Appellate Courts *the jurisdiction of*

this court to review the final judgments of those courts, except in the four classes of cases enumerated in the constitution, is subject to the restrictions created by the legislature * * *." (Italics added.)

Same effect:

Freitag v. *Union Stock Yard & Transit Co.* (1914), 262 Ill. 551, 555, 104 N. E. 901, 902.

Kerfoot v. *Cromwell Mound Co.* (1884), 115 Ill. 502, 507, 25 N. E. 960, 961-962.

It was pointed out in the aforementioned motion to dismiss the writ of error that the case did not fall within any of the four classes of cases specified in the cited section of the state constitution as construed by the State Supreme Court (Trans. 3, p. 26).

In pursuance of that constitutional provision the Illinois legislature has, by subparagraph (2) of Section 75 of the Illinois Civil Practice Act (Ill. Rev. Stat., 1947, Chap. 110, § 199, bold face numbering) *set up the time within which and the mode whereby judgments of the Appellate Court may be reviewed.* The pertinent portions of that statute are as follows:

"(2) In all cases in which their jurisdiction is invoked pursuant to law, *except those wherein appeals are specifically required by the constitution of the State* to be allowed from the Appellate Courts to the Supreme Court, the *judgments or decrees of the Appellate Courts shall be final*, subject, however, to the following exceptions: (a) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of the opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court

the grounds of granting said appeal. (b) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court. * * *

"* * * And provided also, that application under this Act to the Supreme Court to cause it to grant leave to appeal for its review and determination shall be made *within forty days* after the judgment of the Appellate Court shall have become final, either through the denial of a petition for a rehearing or the expiration of the time within which a petition for rehearing might be filed, or the expiration of the time within which a notice of intention to file a petition for rehearing (when the filing of such notice is required by rule of the Appellate Court) might be filed; otherwise said power of the Supreme Court to review the judgment and decree of the Appellate Court *shall cease to exist.* Answers to such petitions for leave to appeal may be filed by respondent within fifteen (15) days after the expiration of the time for the filing of the petition for leave to appeal or within such further time as the Supreme Court or some Justice thereof in vacation may grant, if granted within said fifteen-day period." (Italics added.)

Rule 28 of the "Rules of Practice" of the Supreme Court of Illinois (Ill. Rev. Stat., 1947, p. 2548) provides as follows:

"The provisions of the Civil Practice Act and the rules of this Court referring to appellant and appellee shall, to the extent applicable, *include plaintiff in error and defendant in error in criminal cases and in civil cases where writ of error is preserved as a method of review.*

"If a writ of error be improvidently sued out in a case where the proper method of review is by appeal, or if appeal be improvidently employed where

> the proper method of review is by writ of error, this alone shall not be a ground for dismissal, but if the issues of the case sufficiently appear upon the record before the court of review, the case shall be considered as if the proper method of review had been employed." (Italics added.)

It was on the basis of the foregoing quoted constitutional provision, statute, and rule of court that the respondent here moved for dismissal of the writ of error sued out of the Supreme Court of Illinois. The contentions made in the argument in support of that motion may be summarized as follows:

(1) The validity of no statute was involved and, therefore, the cause was not within the purview of the quoted constitutional provision (Trans. 3, pp. 26, 28-30, 32).

(2) Under state procedure the cause was not reviewable by writ of error (Trans. 3, pp. 26, 28-30, 32).

(3) Even if the judgment of the Appellate Court were reviewable by writ of error, the Illinois Supreme Court did not acquire jurisdiction since no proceeding to review that judgment was begun within forty days after that judgment became final, as required by state practice (Trans. 3, pp. 35-39).

(4) The writ of error so filed after the expiration of forty days could not be treated as a petition for leave to appeal under Rule 28, since so to treat it would be a clear circumvention of the above quoted statute (Trans. 3, pp. 27-28, 39-41).

The plaintiff in error in the Supreme Court of Illinois (petitioner here) joined issue in his reply on the questions so raised (Trans. 3, pp. 43-46). The State Supreme Court, on September 15, 1948, passed on the motion of defendant in error (respondent here) holding that "said writ of error is not well taken," and ordering that "said writ of error be and the same is hence dismissed." The same

order stated that it was entered in pursuance of the aforesaid motion to dismiss (Trans. 3, pp. 46-47). A motion by the plaintiff in error asking the court to reconsider its action was interposed and subsequently denied. The issues presented by the motion to reconsider were the same as those presented by the original motion to dismiss (Trans. 3, pp. 48-55).

However, at page 9 the petition for certiorari states that the Supreme Court of Illinois "having given no reason for its action, and no reasons having been established by the Trust Company's [respondent here] motion, its action should be regarded as a final judgment 'rendered by the highest court of a state in which a decision could be had.'" The reasons stated in the Trust Company's motion to dismiss the writ of error are clearly set forth in the motion to dismiss, all of which concern questions of state procedure only. In fact, in petitioner's motion to reconsider the order of dismissal he shows that the ground or grounds on which the Supreme Court of Illinois acted were perfectly clear to him for he said, "*The basis of dismissal must necessarily be (1) that writ of error proceedings were not begun within proper time; or (2) that writ of error does not lie in the present case*" (Trans. 3, p. 48). These bases concern not the merits but questions of state practice.

It is therefore clear that the issues presented and passed on by the Supreme Court of Illinois involved only *state procedural questions*. There was no adjudication on the merits. No federal question was involved.

The holdings of the Supreme Court of the United States concerning its jurisdiction to review decisions of the highest courts of the several states are next in order.

(1) In ruling on the motion to dismiss the writ of error, the Supreme Court of Illinois construed the aforementioned section of the state constitution, the state

statute, and the pertinent rules of that court. The Supreme Court of the United States has uniformly held that it is bound by the construction the state court gives to the state constitution and state statutes. It is accordingly bound by the construction placed by the state court on the constitution, statute and rules herein involved and quoted above.

West v. *Louisiana* (1904), 194 U. S. 258, 261.
Hurwitz v. *North* (1926), 271 U. S. 40, 41.

(2) The motion made in the Supreme Court of Illinois to dismiss the writ of error was based on the alleged failure of the then plaintiff in error (a) to invoke the proper mode of review, and (b) to avail himself of that mode of review or of any other mode of review within the time prescribed by state practice. This court has uniformly held that it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and the time for invoking their jurisdiction, and the rules of practice to be applied in its exercise, whether federal rights are involved or not.

John v. *Paullin* (1913), 231 U. S. 583, 584.
Great Western Telegraph Co. v. *Purdy* (1896), 162 U. S. 329, 339.

(3) The mode of review of the Appellate Court judgment prescribed by the state rules of procedure was by a petition for leave to appeal addressed to the Supreme Court of Illinois and not by writ of error. This court has held that the fact that the State Supreme Court might in its discretion allow or deny such a petition for leave to appeal does not justify a petitioner in failing to engage the state court's discretion.

John v. *Paullin* (1913), 231 U. S. 583, 584 (cited *supra*).
Newman v. *Gates* (1907), 204 U. S. 89, 94.
Southern Electric Co. v. *Stoddard* (1925), 269 U. S. 186, 187.

(4) The petitioner not having availed himself of a review of the alleged merits of his cause by the Supreme Court of Illinois, he has no standing in this court. It was his obligation to exhaust all possible remedies in the State court in the manner in which the State prescribes before resort can be had to the Supreme Court of the United States.

U. S. C. A., Title 28, Sec. 344(b).
Gorman v. *Washington University* (1942), 316 U. S. 98-101.
Newman v. *Gates* (1907), 204 U. S. 89, 94.
McMaster v. *Gould* (1928), 276 U. S. 284.

Under petitioner's heading, "This Court Has Jurisdiction", he cites the case of *Hallberg* v. *Goldblatt Bros.* (1936), 363 Ill. 25, and other Illinois cases to support his claim that, under Article 6, Section 11, of the Illinois Constitution, writ of error was properly invoked as the mode of reviewing the judgment of the Appellate Court in the Supreme Court of Illinois because a constitutional question was involved (Pet., p. 7). The term "constitutional question" as used in those cases refers only to the validity of an Illinois statute. As was clearly pointed out in the motion to dismiss the writ of error in the State Supreme Court, the validity of no state statute was involved in this case (Trans. 3, pp. 32-33). Illinois cases are there cited sustaining the proposition last stated. Of course, as already shown, the State Supreme Court's construction of the State Constitution is final and not reviewable in this court. The Supreme Court of Illinois, in granting the motion to dismiss, quite evidently ruled with respondent as to this construction of the state constitution and on this question of state procedure.

The petitioner relies on Rule 62 of the Supreme Court of Illinois (Pet., p. 8). Again he raises a question of state practice. That rule was invoked by the petitioner in his

motion in the Supreme Court of Illinois for a reconsideration of its order dismissing the writ of error. That court ruled contrary to his contention (Trans. 3, p. 54). This Court has consistently considered construction by the Supreme Court of a state of its own rules of practice, binding on this Court.

It is therefore respectfully submitted that the Petition for Certiorari be denied.

Respectfully submitted,

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